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No. 88-112

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

DAVID MCDOWELL and DONNA MCDOWELL,

Petitioners,

vs.

CREDIT BUREAUS OF SOUTHEAST MISSOURI, INC.,

Respondent.

On Appeal from the Missouri Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS DAVID MCDOWELL AND DONNA MCDOWELL'S PETITION FOR WRIT OF CERTIORARI

David M. Remley
Donald L. Dickerson
Thomasson, Dickerson, Gilbert & Cook
715 North Clark, P.O. Box 1180
Cape Girardeau, Missouri 63702-1180
(314) 335-6651

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

DOES THIS COURT HAVE CERTIORARI JURISDICTION UNDER 28 USC SECTION 1257 TO CONSIDER WHETHER THE FAIR CREDIT REPORTING ACT, 15 USC SECTION 1681 ET SEQ. HAS PREEMPTED THE MISSOURI COMMON LAW TORT ACTION OF DEFAMATION AGAINST CREDIT REPORTING AGENCIES.

II.

DOES THIS COURT'S DECISION IN DUN AND BRADSTREET VS. GREENMOSS BUILDERS, INC., 472 US 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985) INVALIDATE THE STATE OF MISSOURI'S COMMON LAW QUALIFIED PRIVILEGE FOR CREDIT REPORTING AGENCIES AND THUS REQUIRE THE STATE OF MISSOURI TO REDUCE THE LEVEL OF PROTECTION ITS COMMON LAW PROVIDES THIS TYPE OF SPEECH TO NO MORE THAN THE MINIMUM LEVEL OF CONSTITUTIONAL PROTECTION DEFINED IN DUN AND BRADSTREET VS. GREENMOSS.

TABLE OF CONTENTS

Page

Counterstatement of Questions Presented i

Counterstatement of the Case 1

Argument 5

Conclusion 12

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Cook vs. Pulitzer Publishing Company, 145 SW 480 (Mo. 1912) 9, 10

Dun and Bradstreet, Inc. vs. Greenmoss Builders, Inc., 472 US 749, 105 S.Ct. 2939, 80 L.Ed.2d 593 (1985) 7, 8, 11

Estes vs. Antrobus, 1 MO 197 (1822) 9

Grove vs. Dun and Bradstreet, Inc., 438 F2d 433 (C.A.3rd 1971), cert. den., 404 US 898, 92 S.Ct. 204, 30 L.Ed.2d 175 11

Holmes vs. Royal Fraternal Union, 212 SW 100 (Mo. 1909) 10

Illinois vs. Gates, 462 US 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) 5

Minter vs. Bradstreet Company, 73 SW 668 (Mo. 1903) 10

Mitchell vs. Bradstreet Company, 22 SW 358 (Mo. 1893) 9

New York Times vs. Sullivan, 376 US 254, 84 S.Ct. 710, 11 L.Ed.2d 666 (1964) 9, 10, 12

Snodgrass vs. Headco Industries, Inc., 640 SW2d 147 (Mo. App. 1982) 11

Street vs. New York, 394 US 576, 89 S.Ct. 1354 (1969) 5

STATUTORY PROVISIONS:

15 USC Section 1681(e) 6

15 USC Section 1681(n) 6

TABLE OF AUTHORITIES–Continued

Page

15 USC Section 1681(o) 6

15 USC Section 1681(p) 6

28 USC Section 1257 5

TEXTUAL WORKS:

Prosser on Torts, 5th Edition, Section 112 9

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COUNTERSTATEMENT OF THE CASE

This was a jury tried libel action initiated by Petitioners against Respondent, the Petition having been filed on the 31st day of May, 1984.

Petitioners are real estate developers building "spec houses". Respondent is a Missouri corporation, the business of which is the collection, storage and sale of credit information on consumers living in its service area. This information is sold to its subscribers in the form of credit reports on particular individuals upon the specific

request of a subscriber and bi-monthly credit bulletins, which contain public record information. The bulletins are sent to all subscribers who pay for that particular service.

On or about March 26, 1982, Respondent received the March 25, 1982 issue of the St. Louis Daily Record, a legal newspaper, which showed that a Donna R. McDowell, Route 2, Box 298, Jackson Missouri, a seamstress, had filed a Voluntary Petition in Bankruptcy. Because this filing pertained to a resident of Respondent's service area, Respondent's technician, Teena Warf, sought to input that information into the Respondent's computer data base. Ms. Warf ran a search of the then existing credit files and found Petitioner's file, the only computer file for a Donna McDowell living on a rural route in Jackson, Missouri.

On the strength of the matches of surname, first name, rural route, city and zip, the bankruptcy information was posted to Petitioner's file.

Petitioners make much of Respondent's failure to compare the middle names, the marital status, the route numbers, the social security numbers, occupation, sex and credit bureau affiliations in making the match. However, as admitted by Petitioners in the trial and their depositions, and as was made eminently clear to the jury, Ms. Warf did not have all of those pieces of information for both Donna McDowells to use in the comparison. Petitioners continue to attempt to fault Ms. Warf for not comparing and matching information which she did not possess.

In November of 1981, John and Shelby Gilmore entered into a Contract for Deed with Petitioners for the purchase of a house to which Petitioners held title. On April 5, 1982, having heard rumors that Petitioners were in fact bankrupt, the Gilmores filed an application for purchase financing from Colonial Federal Savings and Loan Association, a local mortgage lender. On April 6, 1982, Colonial Federal requested a full credit report on the Gilmores and a "bankruptcy report" on Petitioners to satisfy itself that Petitioners' title was not subject to any bankruptcy estate. On that same day, Respondent caused its computer to generate the credit report of April 6, 1982 which reflected the bankruptcy information posted to that file by Respondent's technician a few days before.

Colonial Federal Savings and Loan, in the person of Amelia Seyer, received the report on or about April 7 or 8, 1982, and directed her supervisor's attention to the bankruptcy filing. Not believing the report to be correct, the supervisor, Kenneth Hayden, directed Ms. Seyer to contact Respondent to confirm the information in the report. Ms. Seyer telephoned Respondent that very day and Ms. Warf began to back check to determine whether an error had been committed. She discovered that same day that the credit report was in fact in error and immediately telephoned Ms. Seyer to advise her that Petitioners were not in bankruptcy. Thus, Colonial Federal Savings and Loan Association, the only entity to which this report was published, was almost immediately advised of its inaccuracy. A corrected written report was mailed to Colonial Federal on April 14, 1982.

Contrary to Petitioners' statement, the Gilmore loan transaction closed on time.

In addition the factual inaccuracies contained in Petitioners' Statement of the Case pointed out above, Petitioners also assert, on Page 3, that Respondent "compounded the error" in "widely" disseminating the bankruptcy reporting in the credit bulletin. This assertion is badly and glaringly false.

Firstly, the bulletins do not use any information from the computer, but rather, are prepared directly from the information source. In this case, the issue of the St. Louis Daily Record containing the report of the bankruptcy filing was in Ms. Warf's possession while she was responding to Colonial Federal's request for verification while the bulletin was being prepared. Thus, the information was not available to the bulletin preparer and was not put into it.

Secondly, the bulletin for the appropriate time period was admitted into evidence at trial. The bulletin showed a three bankruptcy case number gap, those identical case numbers being those contained in the March 25, 1982 issue of the St. Louis Daily Record. One of those case numbers was for Donna R. McDowell.

Thirdly, and most importantly, Petitioners submitted the case to the jury on the theory that the allegedly libelous information was published in the credit bulletin (App. 1). On this submission, the jury returned a unanimous verdict for Respondent thus finding that Respondent *did not* publish the information in the bulletin (App. 2).

ARGUMENT

Certiorari should not be granted in this case on the bases of either of the Questions Presented as espoused by Petitioners, for the reasons that:

A

This Court lacks jurisdiction to consider the alleged preemptive effect of the Fair Credit Reporting Act 15 USC 1681, as the application of the Fair Credit Reporting Act was not presented to nor ruled upon by the Missouri Supreme Court.

In their Petition for Writ of Certiorari, Petitioners purport to invoke this Court's jurisdiction as created and defined by 28 USC 1257. It is well established that in order for this Court to have jurisdiction to review a State Court judgment by Certiorari, the highest Court of the State must have rendered a final judgment which actually considered and ruled upon a federal question. Absent the raising of and ruling upon the federal question by the State's highest Court, this Court lacks jurisdiction to consider the case. *Illinois vs. Gates*, 462 US 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

> "Moreover, this Court has stated that when, as here, the highest State Court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Street vs. New York, 394 US 576, 582, 89 S.Ct. 1354, 1360 (1969)."

Thus, in order to invoke this Court's Certiorari jurisdiction, Petitioners must carry the burden of establishing

that the question of the applicability of the Fair Credit Reporting Act of this cause of action was preserved and presented to the Missouri Supreme Court. Petitioners do not, and in fact, cannot carry that burden.

Petitioners are correct in their claim that they initially pleaded a Fair Credit Reporting Act claim in the trial court. However, that pleading failed to present a viable cause of action because the two year Statute of Limitations prescribed in 15 USC 1681(p) had run (App. 3). The credit report giving rise to this case was prepared on April 6, 1982. Suit was not filed until May 31, 1984 (App. 4-5). Thus, no justiciable Fair Credit Reporting Act cause of action ever existed in this case.

Furthermore, as clearly illustrated in the Missouri Supreme Court opinion and Petitioners' Motion and Request during trial, both of which appear in the Appendix to the Petition for Certiorari now under consideration, the gravamen of Petitioners' complaints and claims of error in the Missouri Courts all revolve around the refusal of Petitioners' tendered jury instructions which sought to avoid the defense of the Missouri Common Law qualified privilege. Conspicious by absence are any references to the Fair Credit Reporting Act. At trial, Petitioners did not tender any instructions purportedly patterned after the Fair Credit Reporting Act, nor does the language of the refused instructions, B, C and D, bear any similarity to the operative words of 15 USC Section 1681(e), 1681(n) or 1681(o) (App. 6-7).

Perhaps the most telling evidence of Petitioners' failure to preserve any issue as to the Fair Credit Reporting

Act are the Points Relied On of their Brief filed with the Missouri Court of Appeals, and resubmitted to the Missouri Supreme Court. (App. 8-9). As with all other materials and sources from which one might discover the issues presented to the Missouri Supreme Court, these Points Relied On are utterly devoid of any reference, direct or indirect, to the Fair Credit Reporting Act.

It is obvious, therefore, that no cause of action based upon the Fair Credit Reporting Act was viable at any time during the life of this case, let alone during the Missouri Supreme Court appellate phase.

In an effort to create jurisdiction where none exists, Pages 4 and 5 of Petitioners' Brief seek to transform the trial instruction conference and the tendered instructions from a discussion of the applicability of the Missouri qualified privilege into a discussion of the Fair Credit Reporting Act. In advancing this argument, Petitioners are attempting to convert an apple into an orange. Even in cold print, the instruction conference clearly conveys the issues being discussed, namely, the viability of Missouri's qualified privilege in light of *Dun and Bradstreet vs. Greenmoss Builders, Inc.*, 472 US 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985).

To confirm that the subject jury instructions were based upon *Dun and Bradstreet*, rather than the Fair Credit Reporting Act, one needs to look no further than Page 11 of Petitioners' own Petition now before this Court, wherein Petitioners state:

> Believing, as did the Missouri Court of Appeals for the Eastern District, that the plurality decision in *Dun*

and Bradstreet determined that a private individual did not need to show "actual malice" in order to recover either actual or punitive damages where the matter reported involved: (a) a commercial speech and (b) a credit report of only private concern, Petitioners below tendered Instructions B, C and D which were refused by the trial court.

There being no final decisions of the Missouri Supreme Court ruling upon the validity or applicability of the Fair Credit Reporting Act, or any other federal question, this Court lacks jurisdiction to consider whether the Fair Credit Reporting Act has preempted the Missouri Common Law tort of libel against a credit reporting agency.

B

This Court's decision on *Dun and Bradstreet vs. Greenmoss Builders, Inc.*, 472 US 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985), holding that such speech is not entitled to substantial First Amendment protection does not require the State of Missouri to reduce the level of protection its common law affords this type of commercial speech.

Respondent submits that Petitioners have misinterpreted *Dun and Bradstreet* by arguing that by finding that this type of speech was entitled to a reduced level of constitutional protection, this Court tacitly directed the Missouri Supreme Court to repudiate its own Common Law qualified privilege for credit reporting agencies. Petitioners' argument is flawed in at least three respects.

Firstly, *Dun and Bradstreet* holds that it is constitutionally permissible to permit the recovery of presumed

and punitive damages in private matter libel cases without the necessity of proving "actual malice", as that term is defined in *New York Times vs. Sullivan*, 376 US 254, 84 S.Ct. 710, 11 L.Ed.2d 666 (1964). This ruling has the practical effect of returning to the pre-*New York Times* law of libel per se, at least for statements which do not involve matters of public concern. *Mitchell vs. Bradstreet*, 22 SW 358, 361 (Mo. 1893); *Estes vs. Antrobus*, 1 MO 197 (1822); Prosser On Torts, 5th Edition, Section 112, 795-796.

In contrast, Missouri's Common Law qualified privilege does not relate to proof of damages, but rather involves a basic element of the tort itself of which Plaintiff bears the burden of proof. *Cook vs. Pulitzer Publishing Company*, 145 SW 480 (Mo. 1912). Since the recognition of the qualified privilege for credit reporting agencies in 1893, in *Mitchell, supra.*, "an action for libel [could not] be founded upon [the communication]" absent proof of publication of the false communication with actual malice.

Mitchell perfectly illustrates, in libel per se cases, the dichotomy between the burden of proving actual malice as an element of the tort and the elimination of the burden of proof on presumed or punitive damages. *Mitchell* fully recognizes and discusses each issue and confirms that they are distinct and separate doctrines. Thus, Petitoners are incorrect in equating the two.

The second flaw in Petitioners' reasoning stems from their erroneous belief that the Missouri Common Law qualified privilege and the constitutional privilege enunciated in *New York Times* are co-extensive doctrines. As established by *Mitchell*, the Common Law qualified privilege predates *New York Times* by over 70 years.

According to Petitioners, Missouri Appellate Courts have misinterpreted *New York Times* and *Gertz* [vs. Robert Welch, Inc., 418 US 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)], and, since 1964, have changed the standard necessary to overcome the qualified privilege from "willful and wanton neglect" to an "actual intent to injure". This contention is clearly incorrect. In fact, at least since 1909, in *Holmes vs. Royal Fraternal Union*, 212 SW 100 (Mo. 1909), the Missouri Supreme Court adopted the standard of an actual conscious desire to injure the Plaintiff. That standard is echoed over seven decades of Missouri authority.[1]

This standard is further expressed in Missouri's original pattern libel instruction (App.10) which requires the addition of the following paragraph when the Court has determined the qualified privilege applies:

> Fourth that such statement was [written] [printed] [knowing it to be false] or [without knowing whether it was true or false and reckless disregard for the Plaintiff's rights] and *with the intent to damage Plaintiff.* (Emphasis added).

The MAI Committee, after *New York Times*, sought to reduce the confusion surrounding the various types of "malice" by adopting the *New York Times* language,

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[1] *Cook, supra.*: "Express malice"; Holmes vs. Royal Fraternal Union, 212 SW 100, 104 (Mo. 1909): "Defendant motivated by personal spite or ill will, express malice"; *Minter, supra.*: "Intent to injure"; Ramacciotti vs. Zinn, 550 SW2d 217, 225 (Mo. App. 1977); Garey vs. Jackson, 193 SW 920, 923 (Mo. App. 1917): "Actuated by motives of personal spite of ill will"; De Van Rose vs. Tholborn, 134 SW 1093, 1094 (Mo. App. 1911): "Malicious motive, feeling of personal ill will, desire to injure".

whether the case involved a "public official" or a "qualified privilege". However, the degree of malice to overcome the qualified privilege remained a mental state characterized by a bad motive. *Snodgrass vs. Headco Industries, Inc.*, 640 SW2d 147 (Mo. App. 1982).

Because the constitutional privilege and the Common Law privilege do not spring from the same soil, a refinement of the constitutional privilege does not necessarily affect the qualified privilege.

The third flaw in Petitioners' analysis is their interpretation of *Dun and Bradstreet* as a directive or mandate to the State of Missouri to reduce the level of protection it has choosen to provide this type of speech to no more than the minimum protection required by the United States Constitution. In making this interpretation Petitioners seek to federalize state libel law.

Clear evidence of the independence of state libel jurisprudence is found in *Grove vs. Dun and Bradstreet, Inc.*, 438 F2d 433 (C.A.3d 1971), cert. den., 404 US 898, 92 S.Ct. 204, 30 L.Ed.2d 175.

Grove was the second appeal from the second trial of a credit report case, the previous trials involving, among other issues, the Pennsylvania Common Law qualified privilege.[2] The Third Circuit Court of Appeals, per Judge

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[2] Altoona Clay Products, Inc. vs. Dun and Bradstreet, Inc., 246 F.Supp. 419 (D.C. Pa. 1965); Altoona Clay Products, Inc. vs. Dun and Bradstreet, Inc., 367 F2d 625 (C.A.3d 1966); Altoona Clay Products, Inc. vs. Dun and Bradstreet, Inc., 286 F.Supp. 899 (D.C. Pa. 1968); Altoona Clay Products, Inc. vs. Dun and Bradstreet, Inc., 308 F.Supp. 1068 (D.C. Pa. 1970).

Aldisert, considered whether the *New York Times* constitutional privilege shielded the Defendant Dun and Bradstreet from liability for its erroneous report. The Court, upon finding that the Plaintiff was not a "public figure", nor did the case involve an "issue of public interest", stated, at 438:

> We hold, therefore, that the doctrine of *New York Times vs. Sullivan* does not extend to private subscription credit reports, and that any allegations of defamation concerning such reports are properly subject to the libel laws of the several states.

It is clear, therefore that the states, including the State of Missouri, are free to define their own libel laws, and are also free to protect certain types of communications, when, in the exercise of their sovereignty, the states find that the legitimate public interests are advanced by providing such protection.

Thus, the Missouri Supreme Court was correct in ruling that Missouri's Common Law qualified privilege for credit reporting agencies was not abrogated by this Court's opinion in *Dun and Bradstreet vs. Greenmoss Builders, Inc.*

CONCLUSION

Because no federal question was preserved and presented to the Missouri Supreme Court for ruling as to the purported preemptive effect of the Fair Credit Reporting Act, and further, because Missouri's Common Law qualified privilege has not been abrogated by any ruling of

this Court, Respondent respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

THOMASSON, DICKERSON, GILBERT & COOK

By DAVID M. REMLEY – #28743
DONALD L. DICKERSON – #17249
Attorneys for Respondent
715 North Clark, P.O. Box 1180
Cape Girardeau, MO 63702-1180
Telephone: (314) 335-6651

APPENDIX

INSTRUCTION NO. 5

Your verdict must be for plaintiff if you believe:

First, Defendant published credit bulletins containing the statement the plaintiffs were bankrupt, and

Second, Defendant was at fault in publishing such statement, and

Third, such statement tended to deprive the plaintiff of the benefit of public confidence and social associations, and

Fourth, such statement was read by members of the public, and

Fifth, Plaintiffs' reputations were thereby damaged.

PREPARED AT COURT'S DIRECTION
TENDERED BY PLAINTIFF DEFENDANT
MAI NO. _____
MAI NO. _____ Modified
MAI NO. _____
GIVEN REFUSED
DATE 11/20/85

MAI NO. 23.06(1)
Submitted by Plaintiff

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiffs David McDowell and Donna McDowell for damages against defendant, Credit Bureaus of Southeast Missouri, Inc., a corporation, we the undersigned jurors, find in favor of:

/s/ Defendant, Credit Bureaus of Southeast MO, Inc.
Plaintiffs David McDowell and Donna McDowell or Defendant Credit Bureaus of Southeast Missouri, Inc.

Note: Complete the following paragraph only if the above finding is in favor of plaintiffs, David McDowell and Donna McDowell.

We, the undersigned jurors, assess the damges of plaintiffs David McDowell and Donna McDowell as follows:

For actual damages $_____(stating the amount)

For punitive damages $_____(stating the amount, or if none, write the word "none".)

Note: All jurors who agree to the above findings must sign below:

/s/ Stephen C. Strong
/s/ Rosemary Logan
/s/ Joyce A. Johnson
/s/ Charles S. McClendon
/s/ Kenneth R. Parsons
/s/ Rebecca J. Ford
/s/ Wanda L. Dickman
/s/ Elaine Priest
/s/ Mary L. Greaser
/s/ Marilyn E. Mayfield
/s/ David G. Heisserer
/s/ Dennis M. Gardner

§ 1681p. Jurisdiction of courts; limitation of actions.

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

(Pub.L. 90-321, Title VI, § 618, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134).

DOCKET SHEET

CAPE GIRARDEAU COUNTY CIRCUIT COURT
CAPE GIRARDEAU COUNTY, MISSOURI

Nature of Action:
Intentional Tort
File No. CV684-889CC

DAVID McDOWELL and DONNA McDOWELL
Plaintiff/Petitioner

vs.

CREDIT BUREAU OF SOUTHEAST MISSOURI, INC.
Defendant/Respondent

Scott E. Walter
Att. for Plaintiff or Petitioner
David Remley
Att. for Defendant or Respondent

DATE	ORDERS OF THE COURT
5-31-84	Petition (Counts I - IV) filed by Plaintiff. /s/ cg
6-1-84	Summons issued and directed to the Sheriff of Cape County for service on defendant. /s/ cg
6-7-84	Sheriff of Cape Girardeau County files return on Summons showing service of Credit Bureau of Southeast Missouri Inc., by leaving a copy of the summons and petition with Bill Berry, Registered Agent, for Corp. on June 4, 1984. /s/ mt
6-14-84	Due to the fact that Judge A. J. Seier is knowledgeable about computers, cause assigned to Judge A. J. Seier.
8-8-84	Answer filed by David M. Remley, attorney for defendant. /s/ cg
10-3-84	Interrogatories filed by David Remley, attorney for defendant. /s/ cg

2-20-85 Motion to Compel Answers to Interrogatories filed by David M. Remley, attorney for defendant. /s/ cg

2-22-85 Motion for Additional Time to Answer Interrogatories filed by Kenneth L. Waldron, attorney for plaintiffs. /s/ cg

2-25-85 Suggestions in Opposition filed by David M. Remley, attorney for defendant. /s/ cg

2-28-85 Memo filed by Hon. A. J. Seier setting matter for pretrial conference and selection of trial date on March 11, 1985 in Jackson. /s/ A.J.S. (Copy of memo mailed to attorneys of record on this date.) /s/ C.P.H.

3-11-85 Memorandum of Judge A. J. Seier filed setting cause for trial in Jackson on April 30, 1985. /s/ cg

3-13-85 Copy of memo dated 3/11/85 sent to attorneys of record. /s/ cg

4-2-85 Memorandum of Judge A. J. Seier filed setting cause for pretrial conference in Cape on April 22, 1985. /s/ cg

4-3-85 Copy of memo dated 4/2/85 sent to attorneys of record. /s/ cg

§ 1681e. Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(Pub.L. 90-321, Title VI, § 607, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1130).

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§ 1681n. Civil liability for willful noncompliance.

Any consumer reporting agency or user of information which willfully fails to comply with any requirement

imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of–

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub.L. 90-321, Title VI, § 616, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134).

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§ 1681o. Civil liability for negligent noncompliance.

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of–

(1) any actual damages sustained by the consumer as a result of the failure;

(2) In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub.L. 90-321, Title VI, § 617, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134).

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEIR VERDICT MUST BE FOR PLAINTIFF IF THEY FOUND THE RESPONDENT AT ITS FAULT PUBLISHED A FALSE CREDIT REPORT STATING THE APPELLANT HAD FILED FOR BANKRUPTCY. THE COURT ERRED BECAUSE IT WOULD ONLY GIVE THE INSTRUCTION ALONG WITH AN INSTRUCTION ADVISING THE JURY THE RESPONDENT WAS ENTITLED TO A QUALIFIED PRIVILEGE WHEN RESPONDENT WAS NOT SO ENTITLED.

Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985)

M.A.I. 23.06 (1)(2)

Mitchell et al. v. Bradstreet Company, 22 SW 358 (1893)

Prosser and Keeton on The Law of Torts, (5th ed. 1984)

Rosenbloom v. Metro Media, Inc., 403 U.S. 323 (1974)

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)

Greenmoss Builders, Inc., v. Dun & Bradstreet, Inc., 143 VT. 66, 461 A.2d 414 (VT 1983)

Connick v. Meyers, 461 U.S. 138 (1083)

Minter v. Bradstreet Company, 174 Mo 444, 73 SW 668 (1903)

Perdue v. Montgomery Ward and Co., 107 SW2d 12, (MO 1937)

Moore v. Credit Information Corporation of America, 673 F2d 208 (C.A. 8th 1982)

False Credit Reports – Sufficiency of Proof, 40 ALR 3d 1049.

Restatement (Second) on Torts.

Libel and Slander: Report of Mercantile Agency as Privileged. 30 ALR 2d 776.

II.

THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR APPELLANT INSOFAR AS LIABILITY IS CONCERNED AS APPPELLANT SUSTAINED ITS BURDEN OF PROOF WITHOUT DISPUTE IN THE ABSENCE OF ACTUAL MALICE.

Zaggarri v. Nichols, 429 SW2d 758 (MO 1968)

Mitchell et. al. v. Bradstreet Company, 22 SW 358 (1893)

Prosser and Keeton on the Law of Torts, Section 115

23.06 Verdict Directing – Libel

Your verdict may be for plaintiff if you believe:

First, defendant (*describe act such as "wrote a letter"*) containing the statement (*here insert the exact statement claimed to be libelous*), and

Second, such statement tended to expose plaintiff to [hatred] [contempt] [ridicule] [deprive the plaintiff of the benefit of public confidence and social associations],[1] and damaged plaintiff's reputation, and

Third, such statement was read by (*here insert name of person or persons other than plaintiff or the appropriate generic term such as "the public"*).

(If the defense of qualified privilege is raised and the plaintiff claims that the privilege was abused, then paragraph Fourth must also be added.)

Fourth, that such statement was [written] [printed][2] [knowing it to be false] or [without knowing whether it was true or false in reckless disregard for the plaintiff's rights],[3] and with the intent to damage the plaintiff.